IN THE

Supreme Court of the United States

October Term, 1960.
No. 191.

JERRY GIRARDI,

Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
and
LIPSETT, INC.,

Respondent,

v.

ANDERSHONIS, INC.,

Respondent.

ANSWER OF RESPONDENT, LIPSETT, INC., TO PETITIONER'S REPLY BRIEF.

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ARGUMENT.

The plaintiff still persists in misunderstanding the trial judge's treatment of the admitted fact that the respondent Lipsett was not on the premises at the time of the accident. Throughout the trial—and prior thereto, in argument on a

motion before Judge Kirkpatrick—plaintiff's contention was that a general contractor who was not on the premises actually exercising control, lost his status as a statutory employer, i.e., "an employer who permits the entry upon premises occupied by him or under his control of a laborer," etc. He contended that the U. S. Court of Appeals had laid down the test of "in fact control" in *Boettger v. Babcock and Wilcox Co.*, 242 F. 2d 455, 458. (It did not.) The defendant contended that the test was *right* to control, and that the general contractor's presence or absence from the premises was immaterial to determination of that question. The latter contention was adopted by Judge Kirkpatrick and by Judge Clary, and hence the ruling by the trial judge that the absence of Lipsett's employes "has no bearing on the statutory employer status of Lipsett." What was meant by the instruction, and the jury could not fail to understand it, was that if Lipsett retained the *right* to control, it was immaterial whether or not Lipsett's men were on the premises and exercising that control. Judge Clary made the distinction crystal clear when he explained his ruling with the words (144a, 145a):

> "The point that I made and I am leaving with you is this: It is the right of control that governs."

His charge to the jury left to that body *every fact in the case* for determination of the question of *right* of control:

> "Members of the jury, I am leaving to you, *from all four corners of the case*, to determine those questions which I have just posed" (134a).

Plaintiff then shifts his position and maintains that Lipsett *abandoned* his right to control, and says (page 3 of his Reply Brief) that the respondent does "not dispute that a right to control can be abandoned." In the first place, his own undisputed testimony flatly refuted abandonment, for Andershonis, the subcontractor, testified that Lipsett con-

tinued to direct where the scrap was to be shipped (59a), and Julius Lipsett denied that Andershonis was accepted as the contractor in the place and stead of Lipsett (96a, 97a). In the second place, we do not and did not concede that "abandonment" by Lipsett would alter his status as statutory employer. One cannot undertake the duties of a general contractor, with the obligation under the Workmen's Compensation Act which those duties impose, and then wash his hands of that obligation by "abandoning" the work to a subcontractor. He *can* terminate his obligations under the Act by bringing about a novation—an acceptance of a new contractor by the owner and a release of himself by the owner. This, in fact, was one of plaintiff's contentions, but Judge Clary said (111a):

> "You undertook to tell Judge Kirkpatrick that there was a novation. I have found no novation here, because I never have found that P. P. & L. released Lipsett."

It is respectfully submitted that the fact of Lipsett's absence from the premises *was* left for the jury's consideration, together with all other evidence in the case.

Respectfully submitted,

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